Filed 3/26/12 In re I.D. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re I.D., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. P.Z., Defendant and Appellant.	E054528 (Super.Ct.No. RIJ108895) OPINION

APPEAL from the Superior Court of Riverside County. Matthew Perantoni, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Megan Turkat-Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant P.Z. (Mother) appeals from orders denying her petition under Welfare and Institutions Code[1] section 388 and terminating her parental rights to her son, I.D. (the child). Mother contends that the juvenile court erred in summarily denying her section 388 petition. We reject this contention and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2010, Mother was arrested for child endangerment, driving under the influence, and being under the influence of a controlled substance. Mother, while under the influence of a controlled substance, had driven over a curb, into a muddy dirt field, with the child in the backseat, unrestrained. The child, then two years old, lived with Mother. The child's father, D.D., (Father) had been incarcerated since the child's birth, and he was expected to be released in July 2014.[2]

A subsequent blood test revealed that Mother had tested positive for amphetamine. Additionally, while in custody, Mother physically attacked another inmate and had to be restrained. She also exhibited psychotic behavior.

Mother had a chronic history of abusing controlled substances, namely methamphetamine and marijuana, and a long history with child protective services, resulting in the removal of her three older children (the child's siblings) in November 2004. Following her failure to successfully reunify with the child's three siblings,

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Father has never assumed a parental role in the child's life and is not a party to this appeal.

parental rights as to these three children were terminated in April 2007. The paternal grandmother eventually adopted the siblings in August 2008.

On December 21, 2010, the Riverside County Department of Public Social Services (DPSS) filed a petition on behalf of the child under section 300, subdivisions (b) (failure to protect) and (g) (no provision for support), based on Mother's arrest, history of abusing controlled substances, history with DPSS, Father's extensive criminal history, and Father's incarceration. The child was formally removed from parental custody at the detention hearing and placed in the paternal grandmother's home. Mother was provided with supervised visits with the child and informed of the visitation guidelines.

On January 6, 2011, during her scheduled one-hour supervised visit, Mother had attempted to abscond with the child. She had also contacted the police to report that DPSS had kidnapped her child. DPSS followed Mother and asked her to return the child to DPSS. Mother refused, and the child had to be forcibly removed from Mother's arms by law enforcement. Mother was subsequently arrested for being under the influence and possession of a controlled substance.

Subsequently, because Mother continued to pose a safety risk to the child, DPSS requested that visitation be denied to Mother. The request was granted on January 25, 2011.

The paternal grandmother reported that she had not allowed Mother to visit the child's siblings since July 2010, apparently due to her mental state and drug abuse. She stated that Mother "is 'not right' and 'doesn't make sense' and is almost 'psychotic like.'"

The social worker recommended that the allegations in the petition be found true, and that the parents be denied reunification services pursuant to section 361.5. The social worker noted that despite being offered services, Mother still had an extensive unresolved history of abusing controlled substances and failing to benefit from the services. The social worker also believed that Mother was not mentally and emotionally stable. The social worker further noted that the paternal grandmother was willing to adopt the child, and that Father was in agreement with his mother adopting the child.

The scheduled jurisdictional/dispositional hearing was continued to March 7, 2011, to allow DPSS to properly notice the relevant Indian tribes. The hearing was again continued to April 6, 2011, as a guardian ad litem was appointed for Mother.

On March 1, 2011,[3] the juvenile court ordered two psychological evaluations for Mother. However, as of April 6, 2011, Mother was unable to participate in these evaluations, because she was not sober. In addition, on March 28, 2011, Mother had attempted to remove the child from a daycare facility she believed he was enrolled in; she walked through each classroom looking for the child and made threats as she was leaving the facility.

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[3] The April 6, 2011 addendum report incorrectly states that the court ordered two psychological evaluations March 1, 2005.

On April 6 and 21, 2011, the juvenile court issued, and reissued, a temporary restraining order protecting the child and his paternal grandmother from contact by Mother.

The contested jurisdictional/dispositional hearing was held on May 11, 2011. The juvenile court found the allegations in the petition true and declared the child a dependent of the court. The parents were denied reunification services pursuant to section 361.5, and a section 366.26 hearing was set for September 8, 2011. The juvenile court also reissued the temporary restraining order, but directed DPSS to explore Mother's visitation with the child. A permanent restraining order was granted on May 26, 2011.

In a section 366.26 report, the social worker noted that the child was placed in his paternal grandmother's home on December 23, 2010, and was thriving developmentally, physically, and emotionally. Furthermore, the child was very attached to his siblings and paternal grandmother, whom he referred to as "'mom'" and looked to for comfort and support. The paternal grandmother had a mutual attachment to the child, and she displayed a nurturing and protective role with the child. The paternal grandmother desired to adopt the child, and did not believe it was in the child's best interest to have visits with his mother. She, however, was not ruling out the child's contact with Mother in the future once she "[got] her life together." Father had continued to convey his desire to have the paternal grandmother adopt the child. The social worker recommended that parental rights be terminated and that the juvenile court approve the permanent plan of adoption.

On September 8, 2011, Mother filed a "Request to Change Court Order," pursuant to section 388, seeking reunification services. In support, Mother claimed that she had completed two residential substance abuse treatment programs: (1) MFI Recovery Center's (MFI) Intensive Outpatient program on January 31, 2011; and (2) a residential program offered by Victorious Living Institute on August 2, 2011.

A letter from MFI noted that the program was designed to be completed in 16 weeks; that Mother had participated in group and individual counseling sessions; and that she had randomly drug tested negative. A letter from Victorious Living Institute stated that Mother was a resident at the institute from June 5 to August 2, 2011, during which time Mother had participated in anger management classes, drug prevention classes, drug relapse prevention classes, life skills training classes, and Bible studies.

Finally, another letter noted that Mother was admitted to MFI on January 31, 2011; that the program provided substance abuse education, group and individual counseling, attendance at two 12-step meetings weekly; random drug testing; and that Mother had completed 17 out of the 32 sessions with good participation in group counseling.

The section 366.26 hearing was held on September 8, 2011. However, prior to that hearing, the juvenile court noted Mother's section 388 petition would be heard first. DPSS argued that the petition should be denied because, even though Mother had been enrolled in the programs, she could not show it would be in the child's best interest to grant the petition. Mother's counsel did not request any testimony or further evidence be taken, but instead, argued that Mother should receive six months of reunification

services, and later submitted on the petition. The juvenile court denied the petition, noting that "[t]here is a strong possibility that she may be in the process of changing her circumstances . . . but has not demonstrated a change of circumstances." The juvenile court further found that it would not be in the child's best interest to grant the section 388 petition, pointing out that "[t]he child has been in a stable permanent home for some period of time now and deserves permanence."

Thereafter, following argument, the juvenile court found the child to be adoptable and terminated parental rights.

DISCUSSION

Mother contends that the juvenile court erred in summarily denying her section 388 petition. Specifically, she contends that her completion of two substance abuse treatment programs, maintenance of sobriety, and her appropriate care of the child for two years prior to his removal constituted changed circumstances such that the juvenile court should have granted her petition and ordered her six months of reunification services. She further claims that the juvenile court misapplied the applicable standards set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*), and that it was in the child's best interest to grant the petition.

A parent seeking to change an order of the dependency court bears the burden of proving by a preponderance of the evidence that (1) there is a change in circumstances warranting a change in the order, and (2) the change would be in the best interest of the child. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959 [Fourth Dist., Div. Two].) "The

parent bears the burden to show both a '"legitimate change of circumstances,"' and that undoing the prior order would be in the best interest of the child. [Citation.]" (*Ibid.*)

The denial of a section 388 petition, as well as a summary denial of a section 388 petition, is reviewed for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460-461 (*Angel B.*).) The trial court's ruling will not be disturbed on appeal unless the trial court has exceeded the limits of discretion by making an arbitrary, capricious, or patently absurd determination, i.e., the decision exceeds the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*).) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion . . . ." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.)

"The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) "If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.]" (*Ibid.*) Having reviewed the record as summarized above, we conclude the juvenile court properly exercised its discretion by denying Mother's section 388 petition.

A. *Changed Circumstances*

The procedure under section 388 accommodates the possibility that circumstances may change so as to justify a change in a prior order. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*).) Mother sought to set aside the juvenile court's prior order denying her reunification services pursuant to section 361.5. By the time of the hearing

on her section 388 request, Mother had completed two residential treatment programs, one on January 31, 2011, the other on August 2, 2011, and had offered, in support, letters from those treatment facilities. As noted previously, the letters indicated that while in the residential substance abuse treatment programs, Mother had participated in a number of worthwhile programs, counseling sessions, and had randomly drug tested with negative results. By September 7, 2011, a day prior to the sections 388 and 366.26 hearings, Mother had also participated in two 12-step meetings weekly and had completed 17 out of the 32 sessions in group counseling at an outpatient substance abuse program.

However, as the juvenile court noted, the evidence before the court did not compel a finding of changed circumstances to support the petition. We cannot say the conclusion is an abuse of discretion when Mother's history of long-term drug abuse, which had placed the child at risk, and her failure to reunify with her other children was weighed against her short-term efforts to remain clean.

The seriousness of the prior drug abuse and the high risk of a relapse also supports the juvenile court's ruling. The record reveals that drug abuse, particularly methamphetamine, was a reoccurring problem for Mother. It is apparent that her drug use was linked to her inappropriate parenting skills and neglect of the child as evidenced by the reasons for the child's removal and her failure to reunify with her three older children. Mother, while under the influence of a controlled substance, had driven over a curb, into a muddy dirt field, with the child in the backseat, unrestrained. The trial court could reasonably infer that Mother could relapse again after another two years. In light of Mother's lengthy drug history, about nine months of negative drug tests, however

hopeful, do not establish a permanent change and do not justify altering the plan for adoption. Further, inpatient treatment provided such a controlled and structured environment that true recovery and sobriety could not be accurately assessed, let alone predicted. There was no way to tell how Mother would do in the outside world until she actually completed the outpatient drug program, which by the time of the section 388 hearing she had not.

Thus, Mother's circumstances were at best merely changing (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49), as the juvenile court found, and did not justify a change in its prior order. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

Mother relies on *In re Aljamie D.* (2000) 84 Cal.App.4th 424 (*Aljamie D.*), *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 (*Jeremy W.*), and *In re Hashem H.* (1996) 45 Cal.App.4th 1791 (*Hashem H.*), in which the appellate courts reversed the juvenile courts summary denial of the parent's section 388 petitions. Those cases, however, are factually distinguishable. "[T]he petition [in *Aljamie D.*] alleged several concrete changes in the mother's situation, . . . as well as consistent visitation and strong bonding with the children," who "repeatedly expressed" their desire to live with their mother. (*Angel B.*, *supra*, 97 Cal.App.4th at pp. 462-463.) The appellate court recognized that a child's testimony, while not determinative, constitutes powerful demonstrative evidence of its best interest. (*Aljamie D.*, at p. 432.) In addition, the mother in *Aljamie D.* "had tested clean in weekly random drug tests for *over two years*." (*Ibid.*; italics added.) These factors are not present here. More analogous is *Angel B.*, where the appellate court concluded there had not been a prima facie showing of changed circumstance even

though the parent had completed a drug treatment program, because "the time she had been sober was very brief compared to her many years of drug addiction . . . and in the past she had been unable to remain sober even when the stakes involved were the loss of her other child." (*Angel B.*, at p. 463.)

Jeremy W., *supra*, 3 Cal.App.4th 1407, is also distinguishable. In that case, the juvenile court's ex parte order denying the mother's section 388 petition was reversed because the petition amply demonstrated changed circumstances and that a change of order was in the child's best interest. (*Jeremy W.*, at pp. 1411-1412, 1414, 1417.) There, the juvenile court terminated the mother's reunification services after finding no substantial probability that her son would be returned in six months on the *sole* basis that the mother had failed to establish an ability to provide a stable environment. (*Id*. at p. 1415.) The mother's section 388 petition included three declarations that directly addressed this single deficiency. Also, the mother's declaration averred that she had maintained a stable residence, continued to abstain from alcohol and drugs, participated in therapy, and was able to care for her son. The child's grandmother added that the child was strongly bonded with his mother and wanted to be reunited with her. Further, both the grandmother and the child's doctor indicated that the mother was able to provide suitable care for the child. (*Jeremy W.*, *supra*, 3 Cal.App.4th at pp. 1415-1416.) The appellate court concluded that "the uncontradicted declarations incorporated with [the mother's] petition establish a strong prima facie showing of a favorable change in the single negative factor on which the referee purported to base his section 366.21 order, if

not its complete elimination. On these facts, its summary denial without affording a hearing is not supported by the record." (*Jeremy W.*, at p. 1416.)

Here, Mother submitted no such evidence. Furthermore, contrary to Mother's contention, the record shows that Mother was afforded a hearing. In fact, the juvenile court stated that the section 388 request would be heard first and allowed the parties to present argument and evidence. Mother's counsel, however, briefly argued the petition and then submitted on the matter. Moreover, the juvenile court denied Mother services as to the child for several reasons, including her failure to overcome her drug addiction, which resulted in placing the child at risk, as well as the termination of services and parental rights as to her three older children.

The facts in *Jeremy W.* were significantly different from the present facts. In *Jeremy W.*, the mother had completely complied with her reunification plan in every respect *except* for her housing situation. (*Jeremy W.*, *supra*, 3 Cal.App.4th at p. 1415.) The circumstance she later changed had been the sole reason for the lower court's terminating reunification services. In contrast, there is no evidence to suggest that Mother had resolved her chronic addiction to methamphetamine, despite having completed two residential drug treatment programs. Mother had previously been afforded these services; however, she failed to benefit from them, resulting in the removal and termination of services and parental rights as to her three older children. Further, the petition's allegations in *Jeremy W.* supported an implied allegation that the best interest of the child would be served by the changed order because the only basis that

previously existed to prevent reunification had evaporated and harm to the child no longer existed. *Jeremy W.* does not assist Mother.

Hashem H., *supra*, 45 Cal.App.4th 1791, is likewise distinguishable. There, the appellate court found a prima facie case of changed circumstances. The mother's section 388 petition alleged that she had continuously participated in individual therapy for more than 18 months; she had regularly and consistently visited with her six-year-old son for over one year (including overnight visits); she had participated in conjoint counseling with him; she had a stable job and religious affiliations; and she was able to provide a stable home for him. (*Hashem H.*, at p. 1799.) These allegations were supported by a letter from the mother's therapist, which recommended that the child be returned to the mother's custody. (*Id.* at pp. 1798-1799.) Based on the evidence that the mother had participated in therapy for over 18 months and the therapist's recommendation, the appellate court held that the juvenile court abused its discretion in denying the mother an evidentiary hearing. (*Id.* at p. 1799.)

Here, again, there is no evidence to demonstrate that Mother was not afforded an evidentiary hearing. Nonetheless, there was no similar evidence of *completion* in this case; Mother still had not completed her outpatient drug program. Additionally, the contents of Mother's petition and supporting documents come nowhere close to the evidence submitted in *Hashem H.* Mother's petition here was unsupported by any professional opinion that she had resolved her drug addiction and mental health concerns noted in the record.

As the juvenile court observed, Mother was making a change in her life but had not established changed circumstances. Mother's nine-month period of sobriety did not constitute a change of circumstances when weighed in consideration with the myriad of factors relevant in this particular case. We cannot say that the juvenile court abused its discretion or that its conclusion was "'"arbitrary, capricious, or patently absurd."'" (*Stephanie M., supra,* 7 Cal.4th at p. 318.)

B. *Best Interest of the Child*

Even assuming arguendo that Mother showed changed circumstances, she did not establish that reunification services would be in the child's best interest. She focuses on factors advanced by the appellate court in *Kimberly F., supra,* 56 Cal.App.4th at pages 530-532, to evaluate the child's best interests, and she claims that the juvenile court misapplied the factors.

Parent and child share a fundamental interest in reuniting up to the point at which reunification efforts cease. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697.) By the point of a section 366.26 hearing to select and implement a child's permanent plan, however, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Therefore, after reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*Marilyn H., supra*, 5 Cal.4th at p. 309.) "[I]n fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.] A court hearing a motion for change of placement at this stage of the

proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

In arguing that the requested change in this case is in the child's best interest, Mother focuses on the three factors set out in *Kimberly F.*, *supra*, 56 Cal.App.4th 519. The *Kimberly F.* court, after rejecting the juvenile court's comparison of the biological parent's household with that of the adoptive parents as the test for determining the child's best interest, identified three factors, not meant to be exclusive, that juvenile courts should consider in assessing the issue of the child's best interest: (1) the seriousness of the problem that led to dependency and the reason the problem had not been resolved by the time of the final review; (2) the strength of the relative bonds between the child to both the child's parent and the child's caretakers and the length of time the child has been in the dependency system in relation to the parental bond; and (3) the degree to which the problem that led to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. (*Id*. at pp. 530-532.)

However, the *Kimberly F.* factors conflict with the Supreme Court's holding in *Stephanie M.* that stability and continuity are the primary considerations in determining a child's best interest in the context of placement. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Moreover, *Kimberly F.* also fails to take into account our Supreme Court's analysis in *Stephanie M.* of the child's best interest once reunification efforts have failed.

On this record, Mother did not establish that the child's need for permanency and stability would be advanced by reunification efforts. It is important to keep in mind that, where, as here, the juvenile court's ruling is against the party who has the burden of

proof, it is extremely difficult for Mother to prevail on appeal by arguing the evidence compels a ruling in her favor. Unless the juvenile court makes specific findings of fact in favor of the moving party, we presume the juvenile court found Mother's evidence lacked sufficient weight and credibility to carry the burden of proof. (See *Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

In denying Mother's section 388 petition in regard to the best interest of the child, the juvenile court stated, ". . . clearly it would not be in the best interest of the minor child to grant the 388 motion. The child has been in a stable permanent home for some period of time now and deserves permanence." Indeed, Mother's petition does not address the best interest of the child; instead, she merely alleged that she "would like to reunify with her son." "At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification." (*In re Anthony W.*, *supra,* 87 Cal.App.4th at pp. 251-252.)

It is not in the child's best interest for permanence to be delayed for an unknown or indefinite period of time, with no certainty or even likelihood Mother could progress to the point of obtaining custody of the child. Because Mother failed to make a prima facie showing that the requested change is in the child's best interest, the juvenile court did not

abuse its discretion by denying Mother's section 388 petition or failing to properly apply the factors set forth in *Kimberly F*.[4]

In sum, there is insufficient evidence that the delay in permanency planning would be in the child's best interest. As much as Mother was to be commended for her efforts to become an effective parent and resolve her drug addiction, the fact remained that the child could not safely be maintained in Mother's home. Under these circumstances, Mother's showing did not compel the juvenile court to find that allowing Mother services would be in the child's best interest. Therefore, pursuant to *Stephanie M.*, *supra*, 7 Cal.4th at page 317, we conclude the juvenile court did not err in denying Mother's section 388 petition.

[4] Our conclusion that the juvenile court did not abuse its discretion by denying Mother's section 388 petition also resolves Mother's claim that the juvenile court erroneously terminated her parental rights. Mother bases her challenge to the order terminating her parental rights on the assertion that the juvenile court should have granted her a hearing on the section 388 petition. However, as previously noted, the record reveals that the juvenile court allowed Mother to have a hearing on her section 388 request.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

KING
J.

CODRINGTON
J.